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April 15, 1996

By Overnight Delivery

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Preemption of Nongovernmental Restrictions on
Satellite Earth Stations, IB Docket No. 95-59

Dear Mr. Caton:

We write in response to the FCC's Report and Order and Further Notice of Proposed Rulemaking released on March 11, 1996, regarding preemption of certain local regulation of satellite earth station antennas, and proposing to prohibit enforcement of nongovernmental restrictions on such antennas that are less than one meter in diameter (the "FNPRM"). We enclose six (6) copies of this letter, in addition to this original.

Our comments focus upon the serious legal and pragmatic problems that would arise from the proposed requirement that:

- (f) No restrictive covenant, encumbrance, homeowners association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter.

Statement of Interests and Experience

Riser Management Systems (Riser) has extensive experience with delivering services to tenants who require the most sophisticated of telecommunications services.

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[illegible]

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Riser provides telecommunications engineering and consulting services to the owners and managers of commercial properties, with a special emphasis on 'Class A' properties serving tenants with sophisticated and high volume telecommunications needs. In this role, Riser's engineers have physically examined, video-taped, analyzed and reported upon the telecommunications pathways in more than one hundred of America's most important commercial office buildings. In addition, Riser has reviewed, analyzed, or drafted almost one thousand leases and licenses defining rights and obligations of access for cable-TV, Internet service provision, wireless or rooftop use, shared tenant services and general telecommunications access and service offerings. Riser is firmly committed to the belief that providing tenants with ready and efficient access to advanced telecommunications services is in the best interests of the real estate industry, as well as of the United States. Riser is a small business that is vitally affected by the vigor and efficiency of America's telecommunications policies

Based on Riser's experience, a few fundamental facts require recognition as a starting point:

- * Large commercial properties often contain dozens (or hundreds) of hundreds of different companies.
- * A small direct broadcast satellite receiver, cannot provide multi-channel service to dozens (or hundreds) of different users.
- * Installing hundreds of satellite receivers will have a very significant impact upon an office building, even if each device is less than one meter in size. Connecting equipment leading from those receivers will have a significant effect upon the interior spaces of a building even if each receiver is less than one meter in size. The value of leaseholds will be affected as well, and that affect will vary greatly from site to site, floor to floor, and orientation to orientation.
- * *Satisfying tenant desires is essential to survival in the commercial real estate market.* This means balancing and coordinating the desires of many different tenants for multiple competing goods, whether it be for transportation and quiet, ease of access and security, or elegance and cost. In the language of economists, free markets are the most efficient tool ever invented for working through this balancing and coordination.
- * Existing markets honor consumer choice by letting landlords and tenants efficiently negotiate an infinite variety of ways to balance many different goals. These markets function efficiently because they are based upon a centuries-old system of property rights embedded in our Constitution. Long-standing property rights do *not* create market-barriers to the installation of satellite devices wherever they are sufficiently valued by end-users.

CONSTITUTIONAL ISSUES

The restrictions at issue here are the products of arms-length contractual negotiations among non-governmental parties with full market power. Destroying those restrictions will lead to needless litigation, will disrupt the ability of tenants to negotiate the conditions of their leased environments, and will adversely affect the conduct of real estate businesses; all without adequate

justification and in opposition to two fundamental Constitutional requirements: the integrity of contracts, and the requirement that private property be taken for public purposes only when necessary and only with due compensation.

In simplest terms: the proposed rule would mandate the physical invasion of commercial office properties. Thus it is a “taking” within the meaning of the Fifth Amendment to our Constitution. As such, it could be justified *only* by a showing that it is a compelling necessity for the achievement of a critical public purpose, coupled with a determination that no less intrusive alternatives could achieve that public goals. That showing simply cannot be met because the fact is that current markets already allow private citizens to efficiently negotiate the appropriate terms for installation of communications devices upon each other’s properties. Furthermore, even if a ‘taking’ were somehow justified, the Commission would then have to face the Constitutional requirement that there be *just compensation* for that taking.¹ The proposed rule is Constitutionally flawed because it does not define the terms and pricing necessary to provide just compensation. Unlike the proposed rule, the existing market can do exactly that, *unless* it is distorted by a governmental invasions of property rights.

In addition, the proposed rule violates the Constitution’s respect for the sanctity of contracts. It is not merely prospective. By its very terms it is *retroactive*, and would void an element of many existing contractual arrangements.² In the most explicit sense, it is exactly what Art. I, Sec. 10 of the Constitution described when it prohibited an “impairment of contracts.” Since the founding years of our Republic, this has been prohibited without a compelling demonstration of governmental necessity. *Dartmouth College v. Woodward*, 17 U.S. 518 (1819). The necessity for retroactive destruction of valid contract terms simply does not exist in this case.

MARKETABILITY

The FNPRM almost nonchalantly assumes that “nongovernmental restrictions would appear to be directed to aesthetic considerations”. This comment sees only one part of the truth, and seems not to recognize the importance of that part.

Aesthetic considerations are far from the only concerns of America’s citizens; but they are important ones. This is true for many reasons, including historic sensitivity, joining people into a community, simple human delight and the Jeffersonian ‘pursuit of happiness.’ It is also true in a direct economic sense, because the appearance of a building directly affects its marketability.

Most people prefer to live and work in attractive buildings, and the sight of hundreds of satellite antennas bolted to the outside of each rental unit will not appeal to many present and future

¹ For a century it has been clear that ‘compensation’ and ‘public necessity’ are *both*, separately and independently, required in order to justify a taking; neither one alone is adequate. *Missouri Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896)

² The special antipathy for retroactive impairment of contracts lies deep in our history. *Ogden v. Saunders* 25 U.S. (1827).

tenants. Thus, in the commercial rental market, aesthetic considerations are also very real economic considerations.

STRUCTURAL AND SAFETY CONDITIONS

The indiscriminate placement of antennas on the exterior of commercial buildings may also create structural hazards. For instance, the weight or wind resistance of an antenna installed improperly on a balcony railing may weaken the railing, thus creating maintenance problems and--more importantly--a hazard to the safety of tenants, building employees, and passers-by. Antennas mounted directly on a wall will require the drilling of holes; if improperly sealed, water seeping into the holes may create structural deficiencies. There are many mechanisms that could cause such damage, including expansion upon freezing, corrosion of metal mounting elements, seepage into the interior of a building, or weakening of concrete through chemical reaction with substances carried in by the water. Antennas require power, which means additional wiring; and use of antennas means installing leads from antenna sites to customer premises equipment, through building pathways that need to be checked and maintained for adequate capacity, ventilation, drainage, moisture protection, and fire-ventilation-control. All of these possibilities will create new maintenance and repair costs for building owners, plus the safety hazards previously referred to.

TENANT GOALS

Tenants have many goals when they rent a building, and the power to negotiate and enforce a balance of those goals -- *whether among themselves or with the owner of the property* -- is critical to the functioning of a market that balances those goals in accordance with Pareto optimality (or any other principle valued by the negotiators). The Commission's proposal, by destroying the use of covenants among tenants, reduces that consumer power. Some will perceive disparities in value received for existing rents and will complain to owners. When tenants who value a view-shed see a dish through their window, they will complain to owners. When those who value light feel the shadow of a dish, they will complain to owners. When those who wish a stark clean roof line, or a nostalgic lack of technology, see their wants constrained, they will complain to owners. In addition, the technical limitations of satellite technology will create management problems because not all tenants may be able to receive certain services. When tenants on the south side of a building start subscribing to DBS, but tenants on the north side cannot because there is no place to position an antenna to receive the signal, they will complain to building managers. Most importantly, the Commission's proposed rule will destroy consumers' current ability to negotiate for cures if they perceive such problems: they will be unable to negotiate enforceable covenants with neighbors or with landlords and, instead will see that needless regulation has destroyed the market-power that they could have used to protect their rights.

CONCLUSION

We urge the FCC to avoid interfering in the relationship of commercial property owners with their tenants. The engineering problems are real, the invasion of Constitutional rights is direct, the

legal justification is deficient, and there are no structural problems to prevent the existing market mechanisms from efficiently dealing with the issues here

Thank you for your attention to these concerns

Sincerely,

A handwritten signature in cursive script, reading "Michael H. Dworkin".

Michael H. Dworkin, Esq.

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